

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 01**

BERKLEE COLLEGE OF MUSIC

and

BERKLEE FACULTY UNION, AMERICAN  
FEDERATION OF TEACHERS, LOCAL 4412,  
AFT-MA, AFL-CIO

JD-64-13 (Boston, MA)  
Case 01-CA-089878

**COUNSEL FOR THE GENERAL COUNSEL'S BRIEF  
IN SUPPORT OF THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

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**A. STATEMENT OF THE CASE**

This case was heard before Administrative Law Judge Susan A. Flynn in Boston, Massachusetts on April 17 and 18, 2013 and May 3, 2013. On September 20, 2013, Judge Flynn issued her Decision, in which she made certain findings of fact and conclusions of law and recommended that Respondent be ordered to take certain affirmative actions to effectuate the purposes of the Act. Judge Flynn correctly decided that Respondent was required to bargain with the Union over the effects of its decision to increase course population minimums because the effects of the change were material, substantial, and significant. Judge Flynn also correctly determined that the change has the potential to directly and significantly impact unit employees' wages and terms and conditions of employment by potentially depriving them of income and benefits, making them ineligible for 3-year contracts, and, in some instances, requiring them to teach courses requiring more preparation and grading responsibilities. Moreover, Judge Flynn correctly decided that the parties' collective-bargaining agreement contains no clear and unmistakable waiver of the Union's right to bargain over the effects of the increase in minimum course population on unit employees. Finally, Judge Flynn correctly concluded that nothing in the parties' bargaining history establishes that the Union waived its right to bargain over the change. This brief is submitted in support of those findings of facts and conclusions of law.

**B. OVERVIEW**

Berklee College of Music ("Respondent") and the Berklee Faculty Union, American Federation of Teachers, Local 4412, AFT-MA, AFL, CIO ("the Union") have a longstanding collective-bargaining relationship, and are parties to a collective-bargaining agreement which expires on November 3, 2013. Shortly before the beginning of the Fall 2012 semester,

Respondent increased the minimum number of students required to enroll in its courses, resulting in the cancellation of numerous courses on short notice.

In the discussion that ensues, Counsel for the General Counsel will demonstrate that Judge Flynn was correct in concluding that Respondent implemented the change without first notifying the Union or bargaining with the Union over its impact on unit employees. First, Judge Flynn found that, while Respondent was privileged to make the change without first bargaining over the decision, it was required to bargain with the Union over the impact of the decision because the change impacts unit employees' terms and conditions of employment. Moreover, Judge Flynn correctly found that Respondent failed to bargain with the Union over the effects of its decision on unit employees, even though the effects were material, substantial, and significant. As noted by Judge Flynn, the record makes clear that, while many unit employees were not adversely impacted by the change because they were assigned equivalent replacement courses, others were adversely impacted, either because they were not assigned a replacement course, and therefore lost income, or because they were assigned a replacement course which required more preparation and greater responsibilities than the cancelled course. Judge Flynn also correctly determined that neither the parties' bargaining history, nor the language of their collective-bargaining agreement, demonstrates that the Union clearly and unmistakably waived its right to bargain over the impact of its decision to increase minimum course populations.

**C. STATEMENT OF THE ISSUES**

1. Was the ALJ correct in finding that the increase in minimum course populations constituted a change from the past practice?
2. Was the ALJ correct in concluding that Respondent was required to bargain with the Union over the effects of the change, given its impact on bargaining unit employees' terms and conditions of employment?

3. Was the ALJ correct in determining that Respondent failed to satisfy its obligation to bargain with the Union over the effects of the change?
4. Was the ALJ correct in finding that the Union did not waive its right to bargain over the effects of the change?

**D. STATEMENT OF FACTS**

**1. Background**

Founded in 1945, Respondent is the largest contemporary music college in the world. It consists of three academic divisions, Professional Performance, Professional Education, and Professional Writing and Music Technology, each of which is led by a dean. The deans, along with the College's budget manager, and its Vice Presidents for Academic Affairs, Curriculum and Program Innovation, and Special Programs, report directly to Senior Vice President of Academic Affairs and Provost, Lawrence Simpson. The College offers 12 majors and has 37 department chairs and assistant chairs who report to the deans responsible for their respective departments. (T. 325-27, 329) In the fall of 2012, Respondent offered about 2,600 course sections, representing about 1,200 courses. (T. 329)<sup>1</sup> Although its primary campus is located in Boston, Massachusetts, Respondent operates a second campus in Valencia, Spain. (T. 50)

Since about 1985, the Union has represented a bargaining unit consisting of Respondent's part-time and full-time faculty members. (Jt. Ex. 2, p. 1; G.C. 1(1), p. 2; T. 8, 52) The unit is comprised of approximately 580 faculty members, about 60 percent of whom serve on a part-time basis, while the remainder are full-time faculty. (T. 72) The parties' current collective-bargaining Agreement (the Agreement) became effective on September 1, 2010, and remains in effect through November 3, 2013. (Jt. Ex. 2) Under the Agreement, assuming they meet the criteria set forth in Article XVII, full-time faculty are eligible for reappointment for up to five

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<sup>1</sup> All dates hereinafter refer to 2012, unless otherwise indicated.

years at a time, depending on their rank, i.e., Instructor, Assistant Professor, Associate Professor, or Professor. (Jt. Ex. 2, p. 18-20) Part-time faculty are paid on an hourly basis, and are hired on one or three-year contracts. (T. 72, 169) If a part-time faculty member teaches 13.5 or more teaching units in each of the prior three Fall semesters, (s)he is eligible for a contract for the subsequent Spring semester following the third Fall semester, as well as two paid office hours per week.<sup>2</sup> A faculty member on a three-year contract is entitled to renewal of his or her contract if, throughout that period, (s)he maintains a teaching schedule of 27 or more teaching units and receives satisfactory performance reviews. (Jt. Ex. 2, p. 21, 45; T. 89, 91, 169-70) In addition, Articles XXIX through XXXIII of the Agreement set forth the eligibility of both full-time and part-time faculty for various fringe benefits, including leaves of absence, tuition reduction, retirement plans, life and disability insurance, and medical and dental insurance plans. (Jt. Ex. 2, p. 50-63).

## **2. The Past Practice**

According to Michael Scott, faculty member and Union president for 26 years, Respondent's longstanding past practice has been to run classes with as few as three or four students.<sup>3</sup> Indeed, historically, Respondent has run classes (that were not intended as private lessons) with as few as one student enrolled. (G.C. 3-1; T. 47-9, 52-3, 55-9, 67, 74, 446)<sup>4</sup>

In his capacity as Union president, Scott met on numerous occasions with various provosts concerning the impact of Respondent's cancellation of courses on bargaining unit

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<sup>2</sup> Although, under Article XVIII(B)(1), they are only guaranteed 60 percent of the teaching units that they taught during the prior Fall semester.

<sup>3</sup> Scott served as president of the faculty Union from 1986, when the Union was first certified as the employees' bargaining representative, until 2011, when Jackson Schultz became president. (T. 52)

<sup>4</sup> A course with a minimum population of one (1) is referred to as a "private lesson" or a "directed study." (T. 268, 415-16) The practice with respect to minimum course populations does not apply to courses such as trios, quartets and directed studies, which, by their very nature, require a fixed number of students. (G.C. 20, p. 3, G.C. 22, p. 4)

employees. These informal meetings were designed to assist faculty members who lost income, or were otherwise adversely impacted by Respondent's cancellation of a course due to insufficient enrollment. In meetings with former Provosts Warrick Carter,<sup>5</sup> Ronald Bentley,<sup>6</sup> and Harry Chalmiers,<sup>7</sup> Scott was repeatedly reminded that Respondent's practice was to run classes with as few as three to four students enrolled. (T. 61-2) Scott had similar discussions, in which he sought to assist faculty members who had been adversely impacted by the cancellation of courses, with Simpson. Each of these discussions involved a course in which three or fewer students were enrolled when the course at issue was cancelled. (T. 65)

Professor of Ensemble Dennis Cecere, who has taught at Respondent for nearly 40 years, in multiple departments, corroborated Scott's testimony regarding the past practice. (T. 177) He testified that, about three or four years ago, Jack Perricone, Songwriting department chair, had reassured him that he need not be concerned that his Song Demo Production in a Recording Studio course would be cancelled, because there were four students enrolled. (T. 180-1) Similarly, Associate Professor Jeffrey Perry testified that he has taught an Arranging class with only three students enrolled. (T. 148, 151) Part-time professors Linda Gorham and Joyce Lucia testified that they have each taught courses that were not directed studies with four or fewer students. (T. 430-31, 446)

Respondent's past practice with respect to course enrollment minimums was recognized not just by the Union and faculty members, but most notably by department chairs, who are statutory supervisors and agents of Respondent. They play an active role in the scheduling of classes, and are charged with, among other tasks, deciding how frequently a course should be

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<sup>5</sup> Carter served as Provost from about 1992 until 1996. (T. 63)

<sup>6</sup> Bentley served as interim Provost in the late 1990s. (T. 63)

<sup>7</sup> Chalmiers served as Provost from about 2002 until about 2005. (T. 63)

offered in order to maximize enrollment, or whether a course should be offered at all. (G.C. 2 and 7; T. 276, 279-80, 293, 384)<sup>8</sup> As such, their representations concerning Respondent's past practice with respect to course enrollment minimums deserve substantial weight.

In separate emails to faculty in their respective departments announcing the change at the beginning of the Fall 2012 semester, Ear Training Department Chair Allan Chase and Ensemble Department Chair Ron Savage explicitly acknowledged Respondent's past practice of maintaining course minimums of three to five students. Chase's email refers to Respondent's past practice of maintaining minimums of three and five, depending on the course, while Savage's email refers to a past practice of requiring a minimum of four students in order for a class to run. (G.C. 2, 7) Moreover, while they do not explicitly describe Respondent's past practice with respect to course enrollment minimums, emails from the Chair of the Professional Music Department Kenn Brass to faculty in his department implicitly acknowledge that Respondent's decision to increase minimum enrollment for nearly all courses represented a significant departure from Respondent's past practice. (G.C. 4, 5, 6).

Finally, and perhaps most significantly, in an August 21 email, Darla Hanley, Dean of the Performance Education Division (PED), notified division chairs of the change as follows:

I learned today that course minimums have been increased for the fall semester (attached). Please review individual class enrollments for your department – now in light of these adjustments – and let me know your thoughts about canceling any sections. We are still striving to achieve the requested budget reductions. Let me know if you have any questions. Thanks!

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<sup>8</sup> Although Cowen testified that no such minimums existed, she acknowledged on cross-examination that the vast majority of courses cancelled during the 2010-2011 and 2011-2012 academic years had student enrollments of two or fewer when they were cancelled. Indeed, only six of the 275 courses cancelled during that two year period had more than four (4) students enrolled. (G.C. 23; T. 248, 268, 310-12)

The spreadsheet attached to Hanley's email indicates the existence of a prior minimum enrollment ("Min Enroll") of three to five students in most department courses, and a new recommended minimum ("Rec MIN") of five to seven. (G.C. 16)

Finally, Chair of Respondent's Curriculum Committee Jeanine Cowen, on direct examination, unequivocally denied that Respondent had a past practice of maintaining minimum course populations at three to five. When questioned directly about what the minimum course populations were prior to the August 2012 change, she testified that they ranged anywhere from three to ten. (T. 249, 268) On cross-examination, however, she conceded that, prior to the change, many classes ran with only three students. (T. 236)

### **3. Implementation of the Unilateral Change**

#### **(a) Curriculum Committee's Recommendation to the Provost**

In about May 2011, Respondent's Curriculum Committee adopted a proposal to increase the minimum course population. The committee recommended to the Provost that Respondent increase the minimum course population in any given course to 33-35 percent of the maximum course population. Thus, in a course with a maximum population of 20, the minimum population would be seven. Similarly, in a course with a maximum population of 30, the minimum population would be 10. In making its recommendation to the Provost, the Committee recognized the existence of courses with enrollment minimums of three and concluded that those minimums made "no sense," except where there was a defined purpose or need, for instance, in the case of a piano trio. (G.C. 20, p. 3; G.C. 22, p. 4; T. 232-34)

No representative of the Union served on the committee when the decision to increase minimum course populations was made, nor was any Union representative consulted in

connection with the decision. Moreover, at no time, in considering and adopting this proposal, did the Committee discuss its impact on part-time faculty. (T. 312-13)

(b) Respondent's Announcement of the Change to Deans and Department Chairs

Although Respondent's Curriculum Committee made its recommendation to increase minimum course populations in May 2011, the change was not implemented until the Fall of 2012. (T. 297-298)

No public announcement was made upon implementation. However, sometime during the late summer of 2012, Simpson sent an email to each of the deans, attaching to it a spreadsheet that identified the new minimum for each course and section. (T. 298, 388)<sup>9</sup> The deans, in turn, notified their respective department chairs, asking them to review individual class enrollments for their departments and make recommendations to the deans about whether, in light of the increased minimums, any class sections warranted cancellation. (G.C. 5, 16)

Simpson denied having asked the deans to forward the information concerning new minimums to their respective department chairs and professed uncertainty as to whether he expected them to do so. (T. 393)<sup>10</sup> Nonetheless, he acknowledged that in order to give meaning to the Curriculum Committee's recommendation, the deans would have had to communicate the substance of the new guidelines to their respective department chairs. (T. 398)

Email communications from other Respondent representatives to department chairs and faculty members suggest that in fact, on August 21, Respondent communicated the change in

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<sup>9</sup> Although Simpson testified about the existence of the email and attached spreadsheet, they were not offered into evidence by Respondent. Simpson could not recall what the email said, or whether the spreadsheet also listed the old minimums. (T. 388-9)

<sup>10</sup> According to Simpson, the deans sit on the Curriculum Committee and participated in the process; therefore this was not new information to them. (T. 389) The minutes from the May 31, 2011 Curriculum Committee meeting, at which the recommendation to increase minimum course populations was discussed and adopted, show only one of the three deans, Kari Juusela, in attendance. (G.C. 22, p. 1)

policy to deans and department chairs. In her August 21 email to the Performance Education Division chairs, for example, Dean Hanley indicated that she had "learned today" about the increase in course minimums. (G.C. 16) On the same date, department chair Kenn Brass sent an email to faculty in his department in which he announced the change, indicating that he had "only learned about this a couple of hours ago." (G.C. 5)

(c) Union Learns of the Change from Membership

Beginning in about mid-August, Union President Jackson Schultz became aware, via emails from various department chairs forwarded to him by unit employees, of a number of changes that were being implemented by Respondent. (T. 78) The first of these emails, dated August 17, and forwarded to Schultz by unit employee Tom Stein, a professor in the Professional Writing department, was from Kenn Brass, chair of the Professional Music department. In this email, Brass alerted faculty to a number of changes which he indicated were likely to impact their schedules for the Fall semester. (G.C. 4; T. 78)<sup>11</sup> A few days later, Schultz received additional emails from various department chairs, forwarded to him by unit employees, announcing Respondent's decision to increase minimum course populations. (T. 76, 80, 97-8; G.C. 2, 5-7)<sup>12</sup> These included an August 21 email from Brass, in which he stated:

....Well, another bomb has been dropped – MINIMUM ENROLLMENT HAS BEEN RAISED TO SEVEN (7) FOR NEARLY ALL COURSES! What this means is that courses are in jeopardy that were not before.

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<sup>11</sup> In his testimony on surrebuttal, Brass reiterated his understanding of the past practice. On direct examination, Respondent's counsel asked him, referring to G.C. 29, what the basis was for his statement that Professor Linda Gorham's PM-320 class was being cancelled due to the increase in course minimums from three to seven. He responded that, "...three was always where the course was and we were getting new course minimums." Although the rest of his testimony is somewhat opaque, he refers to the "new seven," which appears to be a reference to the change in minimum course population. (T. 461)

<sup>12</sup> The parties stipulated that department chairs are statutory supervisors and agents of Respondent within the meaning of Section 2(11) of the Act. (T. 384-5)

Having only learned about this a couple of hours ago, I do not know where all Pro Music courses stand. Contact will be made with you tomorrow as I gather further information.

(G.C. 5; T. 76-77, T. 436)(emphasis in original). The next day, August 22, Schultz received another email from unit employee Stein, forwarding an email from Brass, in which Brass stated,

...I am not sure if you read my latest email from last night, but a new wrinkle has been added. Minimum population for nearly all classroom instruction has been raised to seven (7)! So, many more courses are in jeopardy than we knew of just a day ago. It also means that it will be the part-timers who will suffer as the college looks to assign full-timers to the max. I truly believe some part-timers could even lose their total teaching schedules less than three weeks before classes begin!

(G.C. 6; T. 77-9) On September 4, less than a week before the first day of classes, Schultz received an email, forwarded by a unit employee, from Ron Savage, Chair of the Ensemble Department. Savage's email, which he sent to faculty in his department, with a copy to Matt Marvuglio, Dean of Performance Studies, read as follows:

A number of you have contacted Sean about class cancellation concerns and the sudden change in ensemble population minimums. Here is what I have learned to date:

As of today Tuesday 9/4/12 NO ensembles, PS courses or Harmonic Consideration classes have been cancelled and the Dean has been supportive of keeping these open until the end of placement. At the end of placement low populated classes will be cancelled as they have been in the past.

There have been changes to the minimum populations in a small number of classes, 17 (ensembles and PS courses) in total. These changes mostly affect the big bands and choirs moving from a minimum population of 4 to a minimum of 7. Several small band ensembles changed from a minimum of 4 to 5 and several ensembles and PS courses changed from a minimum of 4 to 7.

I have not listed specific ensembles because if the entering class numbers hold up, according to what Admissions has projected it will take every available seat in every currently scheduled ensemble to fit all of the incoming students. If the numbers provided by Admissions are correct.

At the end of placement before cancelling low populated ensembles, I will first look at the functionality of the instrumentation of said band before making a final decision to cancel....

With all that said, I CANNOT GUARANTEE THERE WILL NOT BE ANY CANCELLATIONS at the end of placement. However, we are following the statistics as closely as possible.

(G.C. 7; R. 7; T. 7, 99, 181, 293)(emphasis in original).<sup>13</sup> That same day, Schultz received another forwarded email from Ear Training Department Chair Allan Chase, in which Chase informed faculty in his department about recent changes by Respondent, including increases in the minimum student population:

Late this summer, some changes have been instituted to help Academic Affairs meet its budget. Chairs and leadership discussed these in late summer and the details have just become available. Most of these changes will have no impact on Ear Training classes or faculty.

One change is in the **minimum number of students per section**. Core classes and the larger electives with maximum class sizes of 15 to 18 now have a minimum population of 7. Electives whose maximum population is 8 or 10 (PFET classes, for example) now have a minimum of 4. Classes whose maximum is 12 (a few electives) have a minimum of 5. In the past, the minimums were 3 for older courses, and 5 for some of the more recently created electives.

(G.C. 2; T. 97-8)(emphasis in original).

(d) Union Requests Bargaining But Decision is a Fait Accompli

Upon receipt of the first three emails, on August 23, Schultz sent an email to Senior Vice President of Academic Affairs and Provost Lawrence Simpson in which he objected to a number of recent unilateral changes by Respondent, including the increase in minimum class population. Schultz noted the possible "serious, adverse impact on our members," and demanded that Respondent rescind the changes until it negotiated with the Union about their impact on unit employees. (G.C. 8; T. 80-1) The following day, Simpson responded to Schultz, confirming

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<sup>13</sup> The abbreviation "PS" refers to a Performance Studies class. (T. 182)

receipt of his email and suggesting that the parties discuss the issue after Labor Day, following the summer recess. (G.C. 9; T. 100-01)<sup>14</sup> Schultz, concerned about the impact of the changes on unit employees, was reluctant to defer the discussion. (T. 82) He wrote back to Simpson, agreeing that if Respondent would rescind implementation of the changes until the parties could meet to discuss their impact on unit employees, Schultz would be willing to wait until after Labor Day. Alternatively, he informed Simpson, he (Schultz) was available to meet the following day. (G.C. 9)

On the afternoon of August 25, Schultz was at home when he received a telephone call from Simpson. They spoke for about 30 minutes. Simpson began by acknowledging that Respondent should have set up a meeting with the Union before the summer recess. He sought to reassure Schultz that no unit employees were going to be fired over the increase in minimum class population. Schultz again asked if Respondent was going to rescind the changes. Simpson responded that he had no intention of doing so. Simpson told Schultz that it would be impossible for the parties to meet until after Labor Day because his team members were out-of-state. The parties eventually settled on a September 5 meeting date. (T. 83-4, 122)

Shortly after his conversation with Simpson, Schultz sent an email to the Union's executive committee summarizing the content of his conversation with Simpson. When he wrote the email, he was upset because Simpson had refused to agree to rescind the changes until the parties could negotiate over their impact. At the conclusion of his email, he notified executive committee members that he intended to draft a letter to faculty over the weekend. (T. 85; G.C. 10)

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<sup>14</sup> After the summer school session is completed, there is a 3-4 week recess, which the parties refer to as "summer recess" or "summer break." (T. 83, 100-01)

A few days later, on August 28, Schultz emailed a letter to unit employees informing them of, among other things, Respondent's increase in minimum course populations. Items 2-9 in Schultz's email were excerpted directly from Brass' emails to faculty in his department. In his August 28 email, Schultz expressed his concern about the possibly devastating impact of these changes on part-time faculty, who, he noted, would face not only the loss of hours and health benefits, but, of far greater concern, job security. (G.C. 4, 5, 11; T. 85-6, 88) His concern about part-time faculty members' potential loss of job security primarily had to do with those who were on three-year contracts, because they were required to teach 27 teaching units per year during the term of their contracts to be eligible for contract renewal. (T. 89)<sup>15</sup>

Simpson and Schultz agreed, via email, that the September 5 meeting would begin at around 4 p.m. On September 2, Simpson requested a private meeting with Schultz before the scheduled September 5 meeting. In his request, Simpson stated:

I don't want the meeting on Wednesday to be a "line drawn in the sand" meeting. You and I have made progress over the course of the last year and I don't want our progress to be thwarted.

The next day, Schultz responded favorably to the email, suggesting that they talk by telephone at 8 p.m. that evening, and indicating that he was "interested to know what you mean by 'line drawn in the sand.'" Simpson confirmed his availability at that time. (G.C. 12; T. 94-5)

On the evening of September 3, at around 8 p.m., Schultz and Simpson had a telephone conversation. It was apparent to Schultz during the conversation that Simpson had Schultz's recent letter to unit employees in front of him while they were talking. Referencing that letter,

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<sup>15</sup> Schultz explained that Respondent uses a system of weighted teaching units. Thus, courses that require work by professors (such as grading or preparation time) outside of the classroom are assigned more weight, i.e., teaching units, than those which require less out-of-class work. Private lessons and ensembles, for example, are assigned one teaching unit per hour of class time, while lecture classes, which require a lot of out-of-class work by the professors, are assigned 1.25 teaching units. (T. 89-90)

Simpson told Schultz that it had not been necessary, and that Schultz did not understand what was happening. Schultz asked Simpson if Respondent planned to have legal representation at the September 5 meeting, and Simpson indicated that it had no such plans. Schultz, in turn, agreed that the Union would not have legal representation, and suggested that the parties "...pretend... that this meeting on the 5<sup>th</sup> is the meeting that we should have had months ago..." (G.C. 11; T. 95-6) To Schultz, the agreement not to have legal representatives present at the September 5 meeting was significant because, in his view, neither Respondent nor the Union would ever participate in a bargaining session without counsel present. Based on the parties' agreement, therefore, he concluded that it would be an informal meeting rather than a formal bargaining session. (T. 97) At 10:04 p.m. that night, Schultz sent an email to members of the Union's executive board confirming the substance of his telephone conversation with Simpson. (G.C. 13; T. 96-7)

(e) The September 5 Union-Management Meeting

The parties met on September 5, as planned. The meeting lasted about an hour. The management representatives at the meeting included Simpson, Jay Kennedy, Assistant Provost, Mac Hisey, Chief Financial Officer, and three deans, Matt Marvuglio (Performance Studies), Darla Henley (Professional Music), and Kari Juusela (Professional Writing and Music Technology). The Union was represented by Schultz, Danny Harrington, vice president, Wendy Rolfe, vice president for part-time faculty, Jeff Perry, secretary/treasurer, Will Sylvio, office manager, and Dennis Cecere and Richard Grudzinski, councilors-at-large. Neither party was represented by counsel. Perry took the meeting minutes for the Union. (G.C. 14; T. 98-100, 155-6)

Schultz began by informing everyone present that the purpose of the meeting was to discuss the changes in classroom populations and course cancellations. He asked Simpson to discuss the recent changes. Simpson acknowledged that the parties should have met before the summer recess, confirming what he had said to Schultz over the telephone on September 3. He indicated that the changes were motivated by Respondent's efforts to "get a handle" on its Academic Affairs budget. (G.C. 14; T. 100, 160, 342)

Simpson proceeded to go through each of the nine items enumerated in Schultz's August 28 email to faculty. At some point during this discussion, Simpson asked what one of the items meant. Having transcribed most of the items directly from Kenn Brass' emails, Schultz admitted that he did not know. Darla Hanley responded that the item in question related to Kenn Brass' department, which, in her capacity as Dean of Professional Music, falls under her control. She explained that the changes for Brass' department were to cover upper-level career planning classes (LHUM-400). (G.C. 14; T. 100-01, 435)<sup>16</sup>

Simpson then discussed the number of classes that had been cancelled, the historical timing of course cancellation, and the number of courses cancelled during past academic semesters. Schultz asked how Respondent had come up with the new minimums. Simpson responded that Respondent offered 1195 courses, and that while some of them (such as trios and quartets) required fixed course populations, if the average course enrollment was 15-19, he asked rhetorically, "what is 7 going to do?" Wendy Roife, the Union's vice president for part-time faculty, responded that one possible impact on part-time faculty was that they could lose their health insurance benefits. Simpson responded that during the parties' last contract negotiations

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<sup>16</sup> Despite record evidence to the contrary, Simpson denied that any of the deans present at the September 5 meeting identified the author of the emails in question, or his departmental affiliation. (T. 342-33)

they had agreed to reduce the threshold number of hours that part-time faculty were required to teach in order to be able to earn health insurance benefits. Schultz interjected that the possible loss of benefits was only one of the concerns for part-timers. He indicated that the Union's greater concern was the loss of courses, and therefore, income, so close to the beginning of the semester. (G.C. 14; T. 101, 161-62)

Referring to two major Respondent initiatives to which, in his view, Respondent was directing far too many of its resources, Schultz mentioned the newly-established graduate program in Valencia, Spain and a new multimillion dollar dormitory at 160 Massachusetts Avenue that was under construction. He argued that management needed to figure out ways to cut back without always trying to squeeze money out of the faculty. (G.C. 14; T. 92, 102-03)

Toward the end of the meeting, Simpson mentioned that he was excited about going into bargaining the following summer. Schultz responded that one of the things he has tried to do as Union president has been to break down the barriers of "us" versus "them." He reiterated the importance of management bringing issues involving faculty to the Union first, so that the parties could try to resolve them. (G.C. 14; T. 163-64)<sup>17</sup>

(f) Respondent Refuses to Delay Implementation

No agreement was reached by the parties at that meeting, or at any other time, about how to minimize the impact of the increase in minimum course populations on part-time faculty. (T.

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<sup>17</sup> The meeting ended cordially, with Schultz reassuring Simpson about a rumor Simpson had apparently heard that faculty were planning to boycott Opening Day. Opening Day was Friday, September 6, the Friday before the academic semester began, when Respondent hosted a gathering for management, faculty and staff at which it provided food, keynote speakers, and performances, as a sort of pep rally to get them excited about the upcoming academic year. Apparently in reaction to some of the changes that Respondent had implemented just before the Fall academic semester began, a number of faculty had contemplated boycotting Opening Day. When Schultz learned that this was being contemplated, he immediately communicated to faculty that the Union did not support the idea, and would not let it happen. At the conclusion of the September 5 meeting, Schultz reassured Simpson and the other representatives of management that there would be no faculty boycott of Opening Day. (G.C. 14; T. 105-06, 164-65)

165-6) Respondent continued to reject the Union's request that it delay implementation of the changes in minimum course populations until the parties could reach an agreement over the impact of the change on unit employees. (T. 105) Since the change was a fait accompli, the Union did not believe there was any value in making further requests to bargain with Respondent, and so it made no further requests. (T. 108)

#### **4. The Effect Of The Change On Bargaining Unit Employees<sup>18</sup>**

Sometime in early September, Simpson sent a note to the entire academic community and the senior leadership of the College, including the Union leadership, notifying them of Respondent's cancellation of 40 class sections that were below the minimum (compared to 66 cancellations in the prior term). (T. 338-39) In a follow-up communication dated October 16, Simpson notified the recipients that Respondent's cancellation of class sections before the Add/Drop period for the fall semester had

...resulted in significantly fewer faculty having reduced workloads since the chairs were able, in most cases, to find alternative sections for the faculty. We offered 2600 sections this fall semester and cancelled only 3% of the sections and these were due, in most cases, to low enrollment.

(G.C. 24, p. 2; T. 398-400)

Jeanine Cowen, Respondent's Vice President of Curriculum and Program Innovation, testified that no courses were cancelled solely as a result of the increase in minimum course population. (T. 200, 204) Her testimony is amply contradicted in the record, both by documentary and testimonial evidence. Longtime professor and union representative Dennis

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<sup>18</sup> Counsel for the General Counsel and the Union offered a stipulation on the first day of trial in which they agreed to limit the scope of the remedy in an effort to resolve a subpoena dispute. Respondent declined to enter into the stipulation. (Jt. Ex. 1; T. 8-11) At no time during the trial did Respondent change its position and agree to be bound by the stipulation. Counsel for the General Counsel noted this fact on the final day of trial, however Respondent remained steadfast in its position. (T. 454-55) Therefore, none of the parties are bound by the stipulation, since the offer of the stipulation was contingent on its acceptance by all parties.

Cecere testified that, upon learning from Academic Scheduling on January 24, 2013 that his Commercial Band Workshop course had been cancelled, he contacted Dean of Performance Matt Marvuglio to find out the reason. Marvuglio responded that the course had been cancelled due to "low population." (G.C. 17, 18; T. 8, 177-78, 184-86) When the course was cancelled, there were five students enrolled. (G.C. 19; T. 186) Cecere has taught that same course with fewer than five students more than three times. (T. 187) Similarly, in an email from her department chair, Kenn Brass, regarding the cancellation of her PM-320 class for the Fall of 2012, part-time faculty member Linda Gorham was informed that the cancellation was "of course...due to the recent change that raised course minimum populations from 3 to 7." (G.C. 29; T. 433-34)

Professor Cecere testified that, when he learned from his department chair, Ron Savage, in late August, that Respondent had increased the course enrollment minimum from four to seven, he was deeply concerned about the likely impact on part-time faculty. (T. 182-83; G.C. 7) Although the Union was aware of only three unit employees who were impacted by the increase in course enrollment minimums as of the conclusion of the trial on May 3, this number does not reflect the number of courses cancelled as a result of the change.<sup>19</sup> In some instances Respondent assigned faculty members other responsibilities so that they could maintain their teaching hours. (G.C. 24, p. 2; T. 109, 111)

Respondent conceded in its position statement submitted to the Region during investigation of the allegations in the unfair labor charge that it reassigned faculty members whose classes were cancelled to other responsibilities, but that not *all* of the faculty members

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<sup>19</sup> The Union maintained at trial that, as of the conclusion of the trial, three faculty members, Joyce Lucia, Linda Gorham, and Jack Pezzanelli, had been impacted by the change. Counsel for the General Counsel hereby withdraws the allegation with respect to the impact of the change on Jack Pezzanelli.

whose classes were cancelled for failure to meet minimum enrollment requirements were given such reassignments:

The College was able to reassign *nearly all* of the faculty members that had been assigned to teach [the courses that did not meet minimum enrollment requirements and were, therefore, cancelled].

(G.C. 20, p. 3) Likewise, in Simpson's October 16 email, discussed earlier, he acknowledged that, although Respondent's cancellation of sections prior to the Add/Drop period for the fall semester resulted in *significantly fewer* faculty having reduced workloads, department chairs were not able to find alternative sections for the faculty in every instance. (G.C. 24, p. 2)

Voice Professor Joyce Lucia, a part-time faculty member for Respondent since 1989 who is currently on a one-year contract, was one of the impacted employees.<sup>20</sup> On August 17, Lucia received an email from her department chair, Anne Peckham, notifying her that "due to strict budget cuts enacted throughout the College, Matt Marvuglio has asked Chairs to cut underpopulated classes in all PPD course offerings for Fall 2012," and that consequently Lucia's American Diction for Singers course (PSVC 131-001), and two of her Voice for Instrumentalists courses, PSVC 231-001 and PSVC 232-001, were being removed from the Fall 2012 schedule. (T. 446, 448; G.C. 32) Although, according to Respondent, there were no students enrolled in PSVC 232-001, and only two were enrolled in PSVC 131-001, three students were enrolled in PSVC 231-001 when it was cancelled in the Fall of 2012. (G.C. 25; T. 305)<sup>21</sup> Lucia testified that she has previously taught a two-hour voice class with only one student enrolled, but that more

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<sup>20</sup> Although Counsel for the General Counsel initially maintained that Lucia was on a three year contract in the Fall of 2012, it withdrew this assertion immediately upon learning that, in fact, she is currently on a one-year contract. (T. 145)

<sup>21</sup> The information pertaining to the cancellation of PSVC 231-001 on G.C. 25 is contained on line 25 of pages 3 and 5 of G.C. 25. According to the information provided by Respondent to the Union, there were three students enrolled in the course at the time it was cancelled, and the minimum course population was five.

typically between one and 12 students were enrolled in these courses in any given semester. (T. 446)

Having been offered no replacement for any of her cancelled courses, Lucia, of her own initiative, contacted Mike Mason, to find out whether any sections of LHUM-100 needed coverage. Mason assigned her a second section, in addition to the one that she was already scheduled to teach. She ended up teaching one section of LHUM-100 at 9 a.m. on Tuesdays and one at 9 a.m. on Thursdays. (G.C. 33; T. 449-50)

Lucia testified that teaching LHUM-100 is far more demanding for her than teaching the two-hour voice class which she has taught for nearly 30 years. While she testified that, for the voice class she follows an outline, and serves more as a guide for her students than anything else, the LHUM-100 class requires her to do five times as much out-of-class preparation. These responsibilities include reading the required texts and monitoring her students' online presence on BerkleeMusic.com, as well as arranging for outside guest speakers (at her own expense), and a multitude of other responsibilities. (T. 451-54)

Professional Music Department Professor Linda Gorham, who has taught on a part-time basis at Respondent since 1997, also was impacted by the increase in minimum course populations. In late August, her department chair, Kenn Brass, notified her via email that her Investment Principles for Professional Musicians (PM-320) class would not be offered in the Fall semester "due to the recent change that raised course minimum populations from 3 to 7." (G.C. 29)

The record contains extensive testimony by both Linda Gorham and Jeanine Cowen regarding the history of enrollment in and the cancellation of this course for the Fall 2012 semester. Gorham explained that in April she discovered that the course had been cancelled

inadvertently, with two to three students enrolled. With the assistance of Brass, Gorham was able to get the course added back to her Fall 2012 schedule. By then, however, the students who had initially enrolled were no longer enrolled in the course. Three new students enrolled after the course was reinstated. When Respondent cancelled it again in late August, they were the only three students enrolled. (T. 431-44; G.C. 27-29)<sup>22</sup> Simpson acknowledged that, before the current academic year, the minimum population for Gorham's PM-320 course was three students. (T. 415)

Respondent provided no credible evidence to refute Counsel for the General Counsel's contention that Gorham's class was cancelled because of its failure to satisfy the new minimum enrollment requirement. Although Cowen fervently denied that Respondent's decision was due to the increase in minimum course population, she offered no alternative explanation beyond speculation that one of the reasons for the cancellation may have been that Gorham was qualified to teach a core course. (T. 205, 208-9)

Late in the afternoon on August 28, Gorham received an email from Michael Mason, Assistant Chair of the Liberal Arts Department, notifying her and 17 other faculty members of the availability of two sections of LHUM-400. (G.C. 30) Gorham responded shortly thereafter, indicating that she could cover one of the sections, but that her availability was limited. The next day, Mason responded to her email indicating that the Monday morning section she had requested was still available, but that she would have to get permission from her department chair, Brass. (T. 434-35; G.C. 31) Gorham explained that, when she responded to Mason's initial solicitation of volunteers to teach the course, she had misread it, and believed that the course for

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<sup>22</sup> Cowen acknowledged that, although she was aware that only three students were enrolled when the course was cancelled in August, she provided inaccurate information in response to a Union information request, notifying the Union that six students had been enrolled at the time the course was cancelled in August. Cowen further acknowledged that she never provided the Union with a correction of this misinformation. (G.C. 25; T. 240-43)

which he was soliciting coverage was Artistry, Creativity and Inquiry (LHUM-100), a first-year seminar course required of most freshman. (T. 289-90, 435-36) When she realized that the course she had been offered was LHUM-400, an upper-level career planning course for musicians, she informed Brass that she did not think it would be a good fit, since her background was in financial planning and she was not a musician. (T. 411, 435-37) They discussed the possibility that in the future Gorham might teach LHUM-100, however she was not offered a section of that class to replace her course that had been cancelled for the Fall semester.<sup>23</sup>

At no time did Brass offer Gorham the opportunity to teach either a LHUM-100 or a LHUM-400 course. Indeed, he did not possess the authority to make her such an offer, since the courses were not in his department. Moreover, when they discussed the issue, Gorham told Brass that most of the times when these courses were offered conflicted with her obligations at other colleges where she teaches. (T. 458-59)

Gorham's PM-320 course was a semester-long two credit course for which she would have earned just under \$3,500, had it not been cancelled. (T. 438-39)<sup>24</sup>

Although Counsel for the General Counsel contends that, as of the completion of the trial, only two unit employees had been adversely impacted by the increase in minimum course population, until Respondent bargains over the impact of the change it is likely that additional faculty will be adversely impacted. Part-time faculty are paid on an hourly basis. Those on three year contracts are required to teach 13.5 teaching units per semester. If they fall below that, they are only paid for the hours they teach, and they lose their two paid office hours. (T. 169) In

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<sup>23</sup> Gorham acknowledged that she and a number of other faculty participated in training sessions to teach LHUM-100 and LHUM-400 in either 2010 or 2011, and that she was compensated for her participation in these training sessions. She testified that she participated in the training sessions at Brass' suggestion. (T. 437, 439)

<sup>24</sup> Her hourly pay rate is \$115.30. (T. 438)

addition, a part-time unit employee on a three year contract risks nonrenewal of his or her contract if, as a result of the cancellation of a course, (s)he drops below the required 13.5 teaching units per semester (T. 170) Moreover, unless a course that a part-time faculty member is scheduled to teach is cancelled, and (s)he is scheduled for a replacement class, his or her compensation is reduced because part-time faculty are only compensated for the courses they actually teach (T. 149-50)

#### **5. Respondent's Failure to Provide Notice to the Union**

Respondent concedes that it did not notify the Union of its decision to increase minimum course populations prior to implementation of the change. In Simpson's view, "it was business as usual," and there was no substantial change. Moreover, he testified, since the contract was silent about minimum course population, he believed Respondent was entitled to make the change without notifying the Union. (T. 337) Indeed, Respondent considered the change to be merely "an administrative detail." (T. 298, 312, 337)

#### **6. The Collective-Bargaining Agreement**

The parties' collective-bargaining Agreement, Article XI, Section A, defines the term "grievance" as

an allegation by the Union that there has been a breach or misapplication or misinterpretation of the expressed term(s) of this Agreement which are subject to the Grievance Procedure...

(Jt. Ex. 2, p. 9)

Article XXIV, Section C of the Agreement, which addresses the issue of class size in the context of unit employees' working conditions, provides as follows:

All classes will have a maximum size as determined by the Senior Vice President for Academic Affairs with input from Departmental faculty. No class may be

assigned more than ten percent (10%) above the maximum size without the prior approval of the affected faculty member.

(Jt. Ex. 2, p. 35) Despite this explicit limitation on maximum class size, nowhere in the agreement is there a discussion of minimum class size. Moreover, the parties never discussed the issue during negotiations for the current contract because Respondent's longstanding practice has been that five or fewer students were required to enroll in order for most of its classes to run.

(Jt. Ex. 2; T. 113-14)

Article XXVI, Section E exempts issues that arise concerning the workload of part-time faculty from the contractual grievance procedure, except when Respondent requires a part-time faculty member to carry a workload greater than that set forth in Article XXVI. (Jt. Ex. 2, p. 46)

The Management Rights clause of the parties' Agreement, Article XXXIV, provides as follows:

- A. All management rights, powers, authority and functions, whether heretofore or hereafter exercised, and regardless of the frequency or infrequency of their exercise, shall remain vested exclusively in the Employer. It is expressly recognized that such rights, powers, authority and functions include, but are by no means whatever limited to, the full and exclusive control, management and operation of its business and its affairs, including the determination of the extent of its activities, business to be transacted, work to be performed, the location of its offices and places of business and equipment to be utilized. The Employer and the Union agree that the above statement of management rights is for illustrative purpose only and is not to be construed or interpreted so as to exclude those prerogatives not mentioned which are inherent to management, except insofar as expressly and specifically limited by the provisions of this Agreement.
- B. This Article applies to both full-time and part-time faculty as described in Article 1.

(Jt. Ex. 2, p. 64)

Article XXXVII, Waiver of Right, of the parties' Agreement provides:

- A. The failure by either party to insist in any one situation upon performance of any of the terms or provisions of this Agreement shall not be considered as a waiver or relinquishment of the right of the Employer or the Union to future performance of any such terms or provisions, and the obligation of the parties to such future performance shall continue. It is understood that neither party gives up the right to argue to prove the assistance [sic] of a past practice.<sup>25</sup>
- B. This Article applies to both full-time and part-time faculty as described in Article I.

Indeed, the Union has in the past relied on the argument that a particular practice was a past practice. (Jt. Ex. 2, p. 67)

Finally, the Agreement's zipper clause, Article XXXVIII, Pre-Existing Rights, Privileges or Benefits, provides that:

- A. The parties acknowledge that during the negotiations which resulted in this Agreement, each had the unlimited right and opportunity to make demands and proposals with respect to any subject or matter not removed by law from the area of collective-bargaining, and that the understandings and agreements arrived at by the parties after the exercise of that right and opportunity are fully and exclusively set forth in this Agreement. Therefore, the Employer and the Union, for the life of this Agreement, each voluntarily and unqualifiedly waives the right, and each agrees that the other shall not be obligated to bargain collectively with respect to any subject or matter referred to or covered in this Agreement, or with respect to any subject matter not specifically referred to or covered in this Agreement. All rights and duties of both parties are specifically expressed in this Agreement and such expression is all-inclusive. This Agreement constitutes the entire agreement between the parties and concludes collective-bargaining for its terms, subject only to a mutual agreement to amend or supplement this Agreement.
- B. This Article applies to both full-time and part-time faculty as described in Article I.

(Jt. Ex. 2, p. 68)

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<sup>25</sup> This contract provision contains a typo, providing that ...neither party gives up the right to prove the *assistance* of a past practice or lack thereof. (Jt. Ex. 2, p. 67) Respondent concedes that the provision should read "existence" rather than "assistance" of a past practice. (T. 354-55)

## 7. The Parties' Bargaining History

Respondent offered into evidence a series of exhibits which purport to represent contract proposals and talking points offered by the Union in negotiations, in an effort to establish that the Union has historically made proposals about issues that relate to the matters in dispute in the instant case. (R. 13-24; T. 355-80)<sup>26</sup> These documents, which allegedly go back to the year 1989, were admitted into evidence in the course of Respondent's direct examination of Simpson, who has been employed by Respondent since August 2005, and who was, by his own admission, not involved in the parties' 2005 contract negotiations. (T. 374, 386) A summary of these exhibits (R. 13-24) is contained in Appendix A to this brief.

In introducing Respondent's exhibits relating to the parties' bargaining history (R. 13-24) into evidence, Respondent's Counsel repeatedly relied on leading questions to testify on behalf of the witness regarding the documents. For example, Counsel showed Simpson a document which he identified for the witness as a "Union proposal from 1989." Respondent's Counsel read the pertinent section of the document into the record and asked the witness to confirm that Respondent had never agreed to the proposal. The document consists of a single-page which may be part of a larger document that was not introduced into evidence. (R. 13; T. 355-57)<sup>27</sup>

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<sup>26</sup> Counsel for the General Counsel had a standing objection to this line of questioning on the basis of relevance. (T. 356, 358-61, 366-71, 380)

<sup>27</sup> Given the leading nature of Counsel for Respondent's questions of his own witness on direct examination, and Simpson's admission that he was not employed by Respondent until August 2005, and did not participate in the 2005 contract negotiations, Simpson's testimony concerning the parties' bargaining history should be given limited or no weight.

**E. ANALYSIS**

**1. Respondent had an established past practice of routinely permitting courses to run with five or fewer students.**

An activity becomes an established past practice, and thus, a term and condition of employment, if it occurs with such regularity and frequency that employees could reasonably expect the practice to continue or reoccur on a regular and consistent basis. *Eugene Iovine, Inc.*, 353 NLRB 400 (2008), *affd Eugene Iovine, Inc.*, 356 NLRB No. 134 (2011); *Sunoco, Inc.*, 349 NLRB 240, 244 (2007), citing *Philadelphia Coca-Cola Bottling Co.*, 340 NLRB 349, 353 (2003). The party asserting the existence of a past practice bears the burden of proof as to whether such a practice exists. *Eugene Iovine, Inc.*, 353 NLRB at 400.

In the instant case, Counsel for the General Counsel has met her burden of proof by establishing that Respondent had a longtime past practice of allowing courses to run with five or fewer students. Respondent's own representatives, its deans and department chairs, in email correspondence announcing or discussing the change, were the source of the strongest evidence in support of the existence of a past practice. Professional Music Department Chair Brass, in his August 21 email, referred to news of the change as a bomb dropping ("well, another bomb has dropped") and expressed his concern that "part-timers could even lose their total teaching schedules less than three weeks before classes begin!" (G.C. 5) Similarly, Ensemble Department Chair Ron Savage, in announcing the change to his department, noted that the changes in minimum populations:

...mostly affect the big bands and choirs moving from a minimum population of 4 to a minimum of 7. Several small band ensembles changed from a minimum of 4 to 5 and several ensembles and PS courses changed from a minimum of 4 to 7.

(G.C. 7). Consistent with these two emails, Ear Training Department Chair Allan Chase acknowledged the past practice in his September 4 email to faculty in his department, noting that:

Core classes and the larger electives with maximum class sizes of 15 to 18 now have a minimum population of 7. Electives whose maximum population is 8 or 10 (PFET classes, for example) now have a minimum of 4. Classes whose minimum is 12 (a few electives) have a minimum of 5. In the past, the minimums were 3 for older courses, and 5 for some of the more recently created electives.

(G.C. 2)

The documentary evidence in support of Respondent's past practice was reinforced by the testimony of Kenn Brass, chair of the Professional Music department, who confirmed that, prior to the change, the minimum for Professor Linda Gorham's PM-320 class had been three, and that the new minimum was seven. (T. 461) Dean Darla Hanley's August 21 email, and attached spreadsheet, also confirm that virtually all of the Professional Education Division courses that previously had minimum populations of three or five now have enrollment minimums of five to seven. (G.C. 16)

Finally, testimony by various Union witnesses, consistent with the representations by Respondent's supervisors and agents, confirms the existence of a longstanding past practice of maintaining minimum course populations of three to four in most instances, and, in some instances, five.<sup>28</sup> Indeed, the past Union president, Mike Scott, who served in that capacity for more than a quarter of a century, testified that in his multiple meetings with a succession of Respondent's provosts over the years, he was repeatedly reminded that Respondent had an established practice of allowing classes with as few as three or four students to run.

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<sup>28</sup> As indicated in G.C. 2, although the Amended Complaint describes the historical minimums as being between three and four, the record evidence regarding historical minimum populations places them at anywhere from three to five. Professor Chase's email suggests that courses for which the historical minimum had been five students consisted primarily of smaller and more recently created elective courses. (G.C. 1(l), p. 3)

**2. The impact of Respondent's unilateral increase in minimum course population, which was implemented without first notifying and bargaining with the Union, constituted a material, substantial and significant change in employees' terms and conditions of employment.**

For a midterm contract modification to violate the Act, it must involve a change that is material, substantial, and significant, affecting the terms and conditions of employment of unit employees. *Carrier Corp.*, 319 NLRB 184, 193 (1995), citing *United Technologies Corp.*, 278 NLRB 306, 308 (1986), and *Peerless Food Products*, 236 NLRB 162 (1978).

While acknowledging that it adopted the Curriculum Committee's recommendation, Respondent describes the change as "business as usual," arguing that it did not constitute a material change but rather a mere "tweaking" or "increased standardization" of existing requirements. (G.C. 20, p. 3, 5) Respondent does not dispute that the change was implemented without first notifying the Union.

The disingenuousness of Respondent's argument regarding the materiality of the change is most apparent in the reactions of its own department chairs to the announcement of the change. Their reactions, as evidenced in emails they sent to faculty in their respective departments upon learning of the change, make clear that it was anything but "business as usual." This fact is most dramatically apparent in Brass' August 21 and August 22 emails to faculty in his department, in which he shared his impression of the magnitude of the change ("another bomb has been dropped") and his concern about the real consequences it would have for unit employees, including the possibility that "some part-timers could even lose their total teaching schedules less than three weeks before classes begin!" (G.C. 5, 6)

**3. Respondent was required to bargain with the Union over the effects of the change prior to implementation because the change impacted employees' wages and terms and conditions of employment.**

It is established Board law that an employer violates Section 8(a)(5) and (1) of the Act if it makes a unilateral change in the wages, hours, working conditions, or other terms and conditions of employment of its employees without first giving the union representing its employees notice and an opportunity to bargain. *USC University Hosp.*, 358 NLRB No. 132 at 16 (2012), citing *NLRB v. Katz*, 369 U.S. 736, 743 (1962).

A violation may be found even where the change has a positive impact on unit employees, and regardless of whether the impact is economic. *Remington Lodging and Hospitality, LLC*, 359 NLRB No. 95, p. 6 (2013) (reversing ALJ finding that unilateral implementation of guest satisfaction incentive plan was de minimus despite its limited impact and despite the fact that impacted employees were eligible for additional compensation under the plan); *General Die Casters*, 359 NLRB No. 7, p. 37 (2012) (employer is required to bargain over change in work assignments regardless of whether the change is "salutary" for employees, and even though the change has no economic impact); *The Bohemian Club and UNITE HERE! Local 2*, 351 NLRB 1065, 1066 (2007); *California Gas Transport, Inc.*, 347 NLRB 1314, 1359-1360 (2006), enfd, 507 F.3d 847 (5th Cir. 2007) (unilateral change in route assignments which inherently affected pay constitute a violation). Moreover, while it is beyond dispute that an employer's unilateral change constitutes an 8(a)(5) violation when numerous bargaining unit employees are affected, such a change can constitute an 8(a)(5) violation when only one employee is affected by the change, *Kentucky Fried Chicken*, 341 NLRB 69, 84 (2004) (employer found to have committed a violation by changing the job duties of one single

employee), and when the amount of money at issue is relatively small. *Bonnell/Tredegar Industries, Inc.*, 313 NLRB 789, 790 and fn 5 (1994).

In the instant case, having established that Respondent unilaterally implemented a material change in unit employees' terms and conditions of employment by increasing minimum course populations, Counsel for the General Counsel maintains that the effects of the change constitute a mandatory subject over which Respondent was required to bargain with the Union prior to implementation.<sup>29</sup>

This is not a case, as Respondent suggests, where it was relieved of its obligation to bargain because the impact of the change was immaterial. The record establishes that two faculty members, Joyce Lucia and Linda Gorham, were adversely impacted by the change during the 2012-13 academic year. Each lost a course, and consequently, income, as a direct result of the change.<sup>30</sup> However, as Professor Lucia noted on the record, the financial impact of the cancellation of her voice class was only one of the ways in which she was adversely impacted. She testified that, as a consequence of the change, she ended up teaching an additional LHUM-100 course, which required a substantially greater time commitment and effort on her part than the voice course which she had taught for 30 years. Thus, to the extent that professors whose courses were cancelled as a result of the unilateral change were assigned to replacement classes that required a far more substantial time commitment, or to courses that were otherwise not

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<sup>29</sup> Counsel for the General Counsel does not contend that Respondent's decision to increase minimum course population was, in and of itself, a mandatory subject of bargaining.

<sup>30</sup> Respondent argues that Gorham was offered a replacement course, LHUM-400, which she turned down, and that therefore she is not entitled to a remedy. The record demonstrates that Respondent's Assistant Chair of the Liberal Arts department sent an email to Gorham and 17 other faculty members asking them to let him know if they had room in their schedules and were able to teach either of two available sections of LHUM-400. (G.C. 30) Given that the "offer" was made to 18 professors, there is no guarantee that, even if Gorham had agreed to teach one of the sections, she would have been assigned to teach the course. Moreover, even if she had been assigned one of the sections, it would have constituted a change in her terms and conditions of employment, as discussed, *infra*, in connection with Professor Joyce Lucia's testimony.

comparable to the classes that were cancelled, such impacts constitute further evidence that the change was, in fact, material and substantial. See *Kendall College*, 228 NLRB 1083, 1083 (1977), in which the Board adopted an Administrative Law Judge's finding that the employer had violated the Act when it unilaterally changed its past practice of consulting with faculty concerning class schedules prior to publication of those schedules for the upcoming term. In so finding, the Judge rejected the employer's arguments that there was no material change from the past practice, that the scheduling of classes constituted inherently a management function, and that the scheduling of a particular class at a particular time, without more, had no effect on wages, hours or terms or conditions of employment. *Id.* at 1086-87.

Finally, as indicated earlier, since, as of the conclusion of the trial, Respondent had not yet bargained with the Union about the effects of the change, the likely impact on faculty members in the future, including the upcoming academic year, must be considered in determining whether or not a violation has occurred. The record evidence demonstrates that the change has the potential to have a far-reaching impact in the future, as more faculty whose classes are cancelled with little or no notice, in the worst case scenario, not only lose a course and the income from that course, but lose their eligibility to renew their three year contract because, as a consequence of the cancellation of their course, they are unable to meet their obligation to maintain a teaching level of 27 teaching units per academic year throughout the term of their contract. Until Respondent bargains in good faith with the Union over its unilateral change in course enrollment minimums it will be impossible to fully evaluate the impact of the change on unit employees.

**4. Respondent did not satisfy its obligation to bargain in good faith over the effects of the increase in course enrollment minimums because, by the time the parties met to discuss the issue, the change was a fait accompli.**

When an employer implements a change without giving the union advance notice and an opportunity to bargain, the union cannot be found to have waived its right to request bargaining. Such an implementation, referred to as a "fait accompli," makes any demand for bargaining futile. Moreover, a union will not be found to have waived its right to bargain over unilateral changes by failing to engage in the futile act of trying to turn back the clock and bargain over an action the employer has already taken. *The Bohemian Club and UNITE HERE! Local 2*, 351 NLRB at 1067, citing *Tri-Tech Services*, 340 NLRB 894, 895, 903 (2003), and *Gulf States Mfg. v. NLRB*, 704 F.2d 1390 (5th Cir. 1983).

As indicated previously, Respondent admits that it did not notify the Union of the increase in course enrollment minimums before it implemented the change because, in its view, it had no obligation to do so. The record clearly establishes that Respondent had implemented the change before the parties' September 5 meeting. Although Simpson claimed not to recall when he sent out the email announcing the change to the deans, emails from Dean Darla Hanley and Department Chair Kenn Brass make clear that they were informed of the change on August 21, or possibly earlier. (G.C. 4, 5, 16) Indeed, as early as August 17, Lucia was informed by her department chair that her "underpopulated classes" were being removed from the schedule, suggesting that implementation may have begun earlier than August 21 in some departments. (G.C. 32)

Finally, neither Simpson nor any other witness contradicted Schultz's testimony that he requested that Simpson rescind the change, and that Simpson refused to do so. Thus, Schultz's testimony to that effect should be credited.

**5. The parties' collective-bargaining agreement contains no waiver of the Union's right to bargain over minimum course population.**

It is settled law that the Board will not infer a waiver of a statutory right unless the waiver is "clear and unmistakable." *Ohio Power Co.*, 317 NLRB 135, 136 (1995), citing *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983). See also *Provena St. Joseph Med. Ctr.*, 350 NLRB 808, 810-13 (2007) (reaffirming the Board's adherence to the clear and unmistakable waiver standard.) The burden of establishing waiver is on the person alleging it. *United Cable Television Corp.*, 296 NLRB 163, 167 (1989). It may not be lightly inferred. *Id.* Indeed, there is a presumption that unions have not abandoned rights guaranteed them by the Act. *Pertec Computer*, 284 NLRB 810, 817 (1987).

Moreover, the Board will not construe generally-worded management rights clauses and zipper clauses as waivers of statutory rights. *Provena St. Joseph Med. Ctr.*, 350 NLRB at 822; *Ohio Power Co.*, 317 NLRB at 136 (1995), citing *Johnson-Bateman Co.*, 295 NLRB 180, 184 (1989). See also *Outboard Marine Corp.*, 307 NLRB 1333, 1338 (1992) (Board will find that a statutory right has been waived only where the applicable collective-bargaining agreement's pertinent provisions as well as its zipper clause clearly and unmistakably indicate such a waiver.) While such a waiver of rights may be demonstrated by the parties' bargaining history, a waiver will be found in such circumstances only if the matter at issue has been fully discussed and consciously explored during negotiations and the union has consciously yielded or clearly and unmistakably waived its interest in the matter. *Ohio Power Co.*, 317 NLRB at 136 (1995), citing *Johnson-Bateman Co.*, 295 NLRB at 185. Moreover, the Board will not construe generally-worded management rights or zipper clauses as waivers of statutory bargaining rights when they do not specifically make reference to a particular mandatory subject, and where there is no

evidence that the parties discussed permitting the specific unilateral action under either of those clauses. *American Benefit Corp.*, 354 NLRB No. 129, p. 18 (2010), citing *Hi-Tech Cable Corp.*, 309 NLRB 3, 4 (1992), *enfd. w/o op.* 25 F.3d 1044 (5<sup>th</sup> Cir. 1994), and *Johnson-Bateman Co.*, 295 NLRB 180, 185 (1989) (Board has consistently found that general management-rights clause does not constitute a clear, unequivocal, and unmistakable waiver by union of its right to bargain about implementation of a work rule not specifically mentioned in the clause). Also see *ANG Newspapers*, 350 NLRB 1175 fn. 3 (2007); *Success Village Apartments, Inc.*, 348 NLRB 579, 629 (2006); see *Michigan Bell Telephone Co.*, 306 NLRB 281, 282 (1992).

There is no dispute in the instant case that the parties' Agreement is silent regarding minimum class size, and that the parties agreed only to contractual restrictions on maximum class size. Nonetheless, Respondent argues that the zipper clause in the parties' agreement, Article XXXVIII, read together with the management rights clause, Article XXXIV, make clear that the Union waived its right to bargain regarding minimum class size. (G.C. 20, p. 2, 5) In so arguing, Respondent maintains that the zipper clause is a comprehensive integration clause which provides that the parties bargained about all relevant issues, and that they consciously chose for the contract to address the issues addressed therein. By the language of this provision, Respondent argues, the Union waived its right to bargain "with respect to any subject or matter not specifically referred to or covered in the Agreement, or with respect to any subject or matter not specifically referred to in this Agreement." Thus, in Respondent's view, the fact that a particular subject area is not discussed in the Agreement cannot be interpreted to mean that it was not addressed in bargaining. If a subject matter was omitted from the Agreement, Respondent contends, the omission was intentional, and the parties are not permitted to bargain

about any omitted subject matters during the contract term because the agreement is all-inclusive. (G.C. 20, p. 5)

Similarly, Respondent cites its management rights clause, Article XXXIV, in support of its position that the parties' collective-bargaining agreement vests it with the exclusive right to determine the "extent of its activities, business to be transacted, [and] work to be performed."

Thus, it argues, it is

...free to establish its own academic goals and methods, including in which areas of study its students will be permitted to engage, how many types of courses it may offer those students within each of those areas of study, how many sections of each type of course it will offer, when those course sections will be offered, and by whom they will be taught.

It argues that these types of business decisions go to the core of its institutional management, and that minimum course enrollment requirements are inextricably related to these core management rights. (G.C. 20, p. 4)

Counsel for the General Counsel does not dispute that Respondent's decision to increase minimum course populations constitutes, in the context of this collective-bargaining agreement, a permissive subject of bargaining. Rather, Counsel for the General Counsel argues that the effects of that decision, because they implicate unit employees' terms and conditions of employment, constitute a mandatory subject of bargaining.

In the instant case, neither the management rights clause nor the zipper clause in the parties' agreement makes reference to minimum class size, nor is there any record evidence that the parties agreed in contract negotiations that the management rights clause would permit Respondent to unilaterally increase minimum class size. Moreover, Respondent cannot rely on

the zipper clause to justify its unilateral implementation of the increase in course minimums without first bargaining with the Union over the impact of that decision on unit employees.<sup>31</sup>

Respondent cites *Rockford Manor Care Center*, 279 NLRB 1170 (1986), in support of its contention that the zipper and management rights clause of the parties' Agreement, taken together, constitute a waiver of the Union's right to bargain over minimum course population. *Rockford Manor* is inapposite, however, because it is factually distinguishable. The Board in *Rockford Manor* upheld the Administrative Law Judge's finding that the union had waived its right to bargain about the employer's mid-term decision to change health plans, basing its decision, in part, on the fact that the parties' agreement in that case provided that:

[f]ull time employees will participate in the [employer's] health and life insurance programs on the same basis as other employee members of the group,

where "group" referred to the employer's non-union employees covered by the same health insurance policy. The employer in *Rockford Manor* changed the health care plan applicable to both its union and non-union employees to avoid a steep premium increase announced by the carrier. *Id.* at 1171. The parties' agreement also contained zipper and management rights clauses which, taken together with the provision quoted above, established that the union had clearly and unmistakably waived its right to midterm bargaining over the changes to the health plan that the employer offered. *Id.* at 1174. Unlike the collective-bargaining agreement in *Rockford Manor*, the Agreement in the instant case contains no language that would support a finding that the Union clearly and unmistakably waived its right to bargain over the effects of changing the minimum course population required in order for a class to run.

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<sup>31</sup> Zipper clauses that are broadly and conclusively worded can serve to "shield" a party on whom a mid-term bargaining demand is made from a refusal to bargain charge, but the Board holds that broadly-worded zipper clauses cannot be used as a "sword" to justify a unilateral change without bargaining. *American Benefit Corp.*, 354 NLRB at 18.

Finally, Respondent maintains that the allegations in the Amended Complaint should have been deferred to arbitration pursuant to *Collyer Insulated Wire*, 192 NLRB 837 (1971). It is the position of Counsel for the General Counsel that the Union had no contractual basis for taking the matter to arbitration, and therefore deferral was inappropriate, because the parties' collective-bargaining agreement is silent with respect to minimum course population, and therefore the issue in dispute in the instant case arises not out of a contract violation, but on a statutory basis by virtue of Respondent's unilateral change to an established past practice. Article XI, Section A of the contract defines a grievance as an allegation that there has been a breach or misapplication or misinterpretation of the *expressed* [sic] terms of the Agreement. Furthermore, Article XXVI, Section E of the parties' Agreement exempts issues that arise concerning the workload of part-time faculty from the grievance procedure, except under extremely limited circumstances. The essence of the Amended Complaint in this case is that Respondent has committed a statutory violation, and not that it violated the contract, by its unilateral implementation of a change, the effects of which constitute a mandatory subject of bargaining, without providing the Union notice and the opportunity to bargain.

**6. No waiver of the Union's right to bargain over minimum course population can be inferred from the parties' bargaining history.**

The record evidence clearly establishes that the parties never discussed the issue of minimum course populations in contract negotiations. Indeed, none of Respondent's bargaining evidence even remotely supports a finding that the parties discussed or negotiated about the

specific issue of minimum course enrollment, much less that the Union consciously yielded or clearly and unmistakably waived its interest in the matter.<sup>32</sup>

Respondent, through Simpson's testimony, represented that between 1989 and 2010 the Union has offered proposals on a wide range of issues which, in Respondent's view, demonstrate that the Union waived its right to bargain over minimum class size. Not one of these proposals, by its explicit terms, mentions minimum class size, nor was any testimony offered to suggest that the parties discussed the issue of minimum class size, either in the context of these proposals, or at any time during contract negotiations. Indeed, Simpson, through whom Respondent's counsel offered this bargaining history evidence, was not employed by Respondent until 2005, and did not participate in the 2005 contract negotiations. Thus, even if, as Respondent's chief negotiator since 2006, he is qualified to testify about what happened at contract negotiations since that date, Respondent presented no evidence to indicate that he has any specific substantive knowledge of what the parties discussed prior to that time with respect to any of the issues contained in the proposals that were admitted into the record.

Even as to proposals that were allegedly offered by the Union since Simpson took over as chief negotiator on behalf of Respondent, no evidence was offered in support of Respondent's theory that the Union, through its bargaining proposals, has clearly and unmistakably waived its right to bargain over minimum class size.<sup>33</sup>

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<sup>32</sup> Simpson's testimony regarding proposals purportedly made in bargaining prior to 2006 should be given no weight, because he provided no context or explanation of what was discussed with respect to these proposals, or even whether they were discussed at all.

<sup>33</sup> Both the 2009 and 2010 proposals presented by Respondent propose that part-time faculty be compensated in full in the event of course cancellation. Neither contains any mention of minimum course enrollment, nor did Simpson testify that the subject of minimum course enrollment was discussed in the context of these proposals. (T. 376-80; R. 23, p. 12; R. 24, p. 9)

The record falls far short in establishing the substance of the parties' bargaining history with respect to any issue, much less the issue of minimum course populations in the instant case. The proposals and talking points Respondent presented in support of its waiver theory were introduced without any context as to whether they were made during contract negotiations or during the term of a collective-bargaining agreement. Moreover, a number of the talking points and/or proposals propose the deletion of unidentified language from an old agreement (which is not in the record), and the substitution of the proposed new language, without any explanation of the impact of the proposed change on either party's contractual rights and/or responsibilities. Without testimony and documentary evidence that would establish what the Union sought to delete, and what changes it sought in place of the deleted language, this testimony is meaningless.

In addition, several of the historical proposals contain the word "class size" in their description or text, but not one of them, by its explicit language, can serve as a legitimate basis for establishing that the Union clearly and unmistakably waived its right to bargain over minimum class size. (R. 15-19) Moreover, Respondent has produced no evidence that any of the "class size" proposals had to do with *minimum* class size, or that the parties discussed anything related to minimum class size when (and if) they discussed these proposals. A mere reference to the phrase "class size" cannot, without more, serve as a basis for finding that the Union clearly and unmistakably waived its right to bargain over the issue of minimum class size.

Finally, even if Respondent establishes that the parties made proposals that related to, and/or discussed *maximum* class size, that fact would be insufficient to establish that the Union consciously yielded, or clearly and unmistakably waived its interest in bargaining over *minimum* course population. Nothing in the record supports a finding that Respondent has met its burden

of proof with respect to establishing by means of the parties' bargaining history that the Union waived its right to bargain over minimum class size.

**7. The appropriate remedy for all affected unit employees is a *Transmarine Navigation Corp.*, 170 NLRB 389 (1968) remedy.**

The Board's standard remedy in effects bargaining cases is the remedy set forth in *Rochester Gas & Electric Corp.*, 355 NLRB 507, 507 (2010), citing *Transmarine Navigation Corp.*, supra, as clarified in *Melody Toyota*, 325 NLRB 846, 846 (1998). See also, *Liberty Source W, LLC*, 344 NLRB 1127, 1128 (2005), enfd 478 F.3d 172 (3d Cir. 2007), cert. denied 552 U.S. 818 (2007), and *Kirkwood Fabricators*, 285 NLRB 33, 36-37 (1987), enfd. 862 F.2d 1303 (8th Cir. 1988). A *Transmarine* remedy requires that the employer bargain over the effects of its decision, and provide unit employees with limited backpay, from 5 days after the date of the Board's decision, until the occurrence of one of four specified conditions. Pursuant to this remedy, an employer is required to pay each affected employee, at the rate of their normal wages, from five days after the date of the Administrative Law Judge's Decision and Order until the occurrence of the earliest of the following conditions: (1) Respondent bargains to agreement with the Union over the effects of the unilateral change; (2) the parties reach a bona fide impasse in bargaining; (3) the Union fails to request bargaining within five business days after receipt of the Respondent's notice of its desire to bargain with the Union; or (4) the Union subsequently fails to bargain in good faith. The amount paid to each employee shall, in no event be less than the monetary value of the wages due to each impacted employee for a two-week period. *Rochester Gas & Electric Corp.*, 355 NLRB supra at 507 (2010).

The *Transmarine* remedy is "designed both to make whole the employees for losses suffered as a result of the violations and to recreate in some practicable manner a situation in

which the parties' bargaining position is not entirely devoid of economic consequences for the Respondent." *Id.*

Although the *Transmarine* case involved employee terminations, the Board has applied the *Transmarine* remedy in cases where the employer's refusal to bargain about the effects of its unilateral decision resulted in neither lost jobs nor reduced wages. In *Santa Cruz Convalescent Hospital, d/b/a Live Oak Skilled Care and Manor*, 300 NLRB 1040, 1041-42 (1990), for example, the employer failed to notify and bargain with the union over the effects of its decision to transfer the ownership of its hospital. In reversing the ALJ's denial of a *Transmarine* remedy on the ground that employees had suffered no financial harm, the Board found the remedy to be appropriate because, armed with the bargaining strength available only in timely effects bargaining, the union might have negotiated additional benefits for the affected employees. Similarly, in *Sea-Jet Trucking Corp.*, 327 NLRB 540, 548-49 (1999), *enfd.* 221 F.3d 196 (Table) (D.C. Cir. 2000), which involved an employer's failure to notify and bargain with the union over the effects of its decision to relocate its business, the Board concluded that, although there was no loss of jobs or benefits, a *Transmarine* remedy was necessary because, had it been notified in a timely manner of the change and been given the opportunity to bargain about the effects, the union might have negotiated compensation for employees who remained with the employer, or accrued benefits for those who resigned as a result of the change. Finally, in *Richmond Convalescent Hospital*, 313 NLRB 1247, 1249 (1994), which involved the employer's transfer of the facility to another employer, the Board rejected the ALJ's refusal to order a *Transmarine* remedy on the ground that there was no showing that any employees lost their jobs as a result of the unilateral change. See also, *Heartland Health Care Center – Plymouth Court*, 359 NLRB No. 155, p. 12-13 (2013).

Similarly, in *Rochester Gas & Electric Corp.*, 355 NLRB 507 (2010), the Board found that the employer, an electric utility company, had unilaterally refused to bargain over the effects of discontinuing its practice of allowing employees to drive company-issued vehicles to and from work. To remedy the violation, the Board ordered the employer to bargain with the union over the effects of its unilaterally-implemented decision, and to pay each employee the monetary value of the vehicle benefit until each of the four *Transmarine* conditions was met. *Id.* at 507. In explaining the basis for granting its award in that case, the Board compared the remedy it ordered to a *Transmarine* remedy, noting that such a remedy is the "standard remedy in effects-bargaining cases," and arguing that such a remedy was appropriately tailored to the violation and would better effectuate the policies of the Act. More specifically, the Board noted that in that case,

...as in *Transmarine* and its progeny, the Respondent violated its legal obligation to engage in timely bargaining about the effects on the employees of its decision to discontinue the vehicle benefit. Although the Respondent's decision to discontinue the benefit did not result in the loss of jobs, as with the partial closing at issue in *Transmarine*, it did cause unit employees to incur economic losses in the form of increased commuting costs. As the Board observed in *Transmarine*...the Respondent's unfair labor practice thus deprived the Union of "an opportunity to bargain...at a time prior to [implementation of the decision] when such bargaining would have been meaningful in easing the hardship on employees..." *Id.*

Here, although Respondent's unilateral decision to increase minimum course populations did not result in the loss of jobs, the record establishes that it caused unit employees to incur economic and other losses. As such, Respondent's action deprived the Union of the opportunity to bargain before implementation when such bargaining might have succeeded in easing or even eliminating the impact on unit employees.

Accordingly, all affected employees are entitled to compensation, at their normal wage rate, from five days after the date of the Administrative Law Judge's Decision and Order in the instant case until the earliest date when any of the four conditions cited above are met. The total amount paid to each employee shall not be less than the monetary value of the wages due to each impacted employee for a two-week period.

**F. CONCLUSION AND REMEDY**

Based upon the foregoing, as correctly concluded by the Administrative Law Judge, Counsel for the General Counsel established that in the late summer of 2012 Respondent unilaterally implemented an increase in minimum course populations without first notifying the Union of the change and bargaining with it about the effects of the change on bargaining unit employees. The Administrative Law Judge also correctly determined that, because it implicates employees' terms and conditions of employment, the change was material, substantial and significant, and that therefore Respondent was required to bargain in good faith with the Union prior to implementation. The Administrative Law Judge further correctly determined that the Union did not waive its right to bargain because it was presented with the change as a fait accompli, and because Respondent made clear its unwillingness to rescind the change to allow for bargaining over the effects. Finally, the Administrative Law Judge rightfully concluded that nothing in the parties' collective-bargaining agreement, or their bargaining history, indicates that the Union waived its right to bargain over the issue of minimum course populations.

For all of these reasons, Counsel for the General Counsel respectfully urges the Board to adopt Judge Flynn's recommended remedy for the 8(a)(5) violations as follows:

In remedy of Respondent's failure and refusal to bargain with the Union over the effects of the change on bargaining unit employees, Respondent should be ordered to bargain with the

Union in good faith over the effects of its decision to increase course population minimums, and to make all affected bargaining unit employees whole as set forth in *Transmarine Navigation Corp.*, 170 NLRB 389 (1968).

Finally, Respondent should be ordered to post Judge Flynn's proposed Notice to Employees.

Respectfully submitted this 18th day of November, 2013.



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## Appendix A

Exhibit #	Year	Subject	Transcript citation
R. 13	None <sup>1</sup>	<ul style="list-style-type: none"> <li>• Faculty curriculum committee</li> </ul>	T. 356-57
R. 14	1992	<ul style="list-style-type: none"> <li>• Guaranteed employment, p. 15</li> </ul>	T. 357-59
R. 15	1996	<ul style="list-style-type: none"> <li>• Maximum class size, p. 27</li> <li>• Part-time faculty job groups, p. 33</li> <li>• Management Rights, p. 43</li> <li>• Pre-existing Rights, Privileges or Benefits, p. 48</li> </ul>	T. 359-63
R. 16	2000	<ul style="list-style-type: none"> <li>• Job security for part/time faculty</li> <li>• Class size</li> <li>• Faculty schedules</li> <li>• Determination of teaching units</li> </ul>	T. 363-64
R. 17	2000	<ul style="list-style-type: none"> <li>• Layoff, p. 21</li> <li>• Working conditions, p. 21, Section A</li> <li>• Class size, p. 21, Section C</li> </ul>	T. 365-67
R. 18	2002	<ul style="list-style-type: none"> <li>• Job security for part-time faculty</li> <li>• Class size (TA's)</li> <li>• Faculty schedules and teaching hours</li> <li>• Teaching load and weighting</li> </ul>	T. 371-72
R. 19	2002	<ul style="list-style-type: none"> <li>• Union/management committee</li> <li>• Article XXII, Working Conditions – Section C, Class Size</li> </ul>	T. 372-73
R. 20	None <sup>2</sup>	<ul style="list-style-type: none"> <li>• Cancellation of courses scheduled to be taught by part-time faculty</li> </ul>	T. 374
R. 21	2005	<ul style="list-style-type: none"> <li>• Compensation for course cancellations due to under-enrollment</li> </ul>	T. 375
R. 22	2009	<ul style="list-style-type: none"> <li>• Are part-time faculty being artificially held to a 14 hour or fewer limit?</li> <li>• Compensation of hourly faculty for cancelled classes and cancelled classes count towards teaching load.</li> <li>• Reduced teaching load or extra compensation for teachers with large classes.</li> </ul>	T. 375-76
R. 23	2009	<ul style="list-style-type: none"> <li>• Article XXVII, Wages, Section H – Compensation of part-time faculty for course cancellation.</li> </ul>	T. 376-77
R. 24	2010	<ul style="list-style-type: none"> <li>• Article XVII, deletion of requirement that part-time faculty teach 27 teaching units per year.</li> <li>• H – Compensation for part-time faculty in the event of course cancellation.</li> </ul>	T. 378-80

<sup>1</sup> Although the document itself is undated and contains no information identifying its source, Respondent's counsel represented to his witness on direct examination that this document is a Union proposal form 1989.

<sup>2</sup> The witness, Simpson, identified this document as a Union proposal from 2005, in response to a leading question from Respondent's Counsel on direct examination. Simpson acknowledged that he did not participate in the 2005 contract negotiations, and offered no basis for knowledge as to whose handwriting is in the upper right-hand corner of the document, when that information was written on the document, or whether it even reflects the date when the proposal was allegedly made.

**CERTIFICATE OF SERVICE**

I, Mary H. Harrington, do certify that I have this day served by electronic mail copies of Counsel For The General Counsel's Brief In Support of the Decision of the Administrative Law Judge to the parties listed below:

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